APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 22, 2004

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 02-3512

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM and Masonry Institute, Bricklayers Local 21 Pension Fund,

Plaintiffs-Appellees,

v.

BANNER RESTORATION, INCORPORATED,

Defendant-Appellant.

Argued May 28, 2004—Decided September 22, 2004

Before BAUER, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs brought this action to compel an audit of Banner Restoration, Incorporated ("Banner") to determine ERISA compliance. Banner filed a counterclaim, seeking a refund of prior payments. After a bench trial, the district court ordered an audit and denied Banner's counterclaim. Banner timely appealed. For the following reasons, we affirm the judgment of the district court.

Appendix A

I

BACKGROUND

A. Facts

The present dispute involves trust fund litigation to ensure that an employer has paid all required fringe benefit contributions. The employer, Banner, is an Illinois corporation that performs concrete and masonry restoration work. The plaintiff trust funds, collectively referred to as "the Funds," were established pursuant to a collective bargaining agreement ("the CBA") entered into by Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen ("the Bricklayers") and various other parties.

Since 1991, Charles Ciancanelli has been the president of Banner. As president of Banner, Ciancanelli would call Bricklayer's Local 21 ("Local 21") or Local 21's Apprenticeship and Training Program, at least four times per year, to ascertain if any bricklayers were available to perform work. If bricklayers were available, they would be provided by Local 21.

On several occasions, Local 21 representatives visited Banner's work sites and insisted that Ciancanelli hire Local 21 members, pay union wages and make contributions to the Funds. Ciancanelli asserted that the representatives threatened "shut down" of the job sites or union picketing if Banner would not comply. On one occasion, Ciancanelli was asked to assume responsibility for the wage and benefit

obligations of another employer working at the same job site as Banner. Ciancanelli's son, Charles Ciancanelli, Jr., testified that representatives came to nearly ninety percent of Banner's work sites, demanding that Banner employ Local 21 members. Local 21 representatives also repeatedly requested that Ciancanelli sign the CBA on behalf of Banner, but Ciancanelli never did so.

Despite Ciancanelli's refusal to sign the CBA, Banner operated in a manner consistent with CBA obligations. In particular, from June 1991 through March 1998, Banner submitted monthly fringe benefit contributions and contribution reports to the Funds. The contribution reports noted the names and social security numbers of union and apprentice employees who performed regular and overtime work covered by the CBA. Some of the monthly reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council # 1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

R.40 at 2-3.[1] Ciancanelli signed the monthly contribution checks drawn on Banner's various accounts and submitted with the contribution reports. Banner's monthly contributions corresponded with the rates prescribed in memoranda sent by the Bricklayers to Banner and signatories of the CBA. Those memoranda detailed the applicable annual wage and benefit rates required by the CBA.

Banner also remitted union dues on behalf of its employees to Local 21. Moreover, in February 1995, Banner cooperated in a payroll audit by the Funds pursuant to CBA terms. The audit covered April 1, 1992, through December 31, 1994. No delinquencies were found. In 1997, Ciancanelli donated a truck and driver to Local 21's Apprenticeship and Training Program. In May 1998, Local 21 notified Banner that it had failed to remit union dues for one employee, and Banner responded by sending the dues.

In 1997, 1998 and 1999, Banner was notified of hearings before the Joint Arbitration Board of the Bricklayers concerning charges of CBA violations brought by Bricklayers Local No. 14. After each of the three hearings, the Joint Arbitration Board found CBA violations at a job site in Romeoville, Illinois. After the 1999 hearing, the Joint Arbitration Board ordered Banner to pay damages to the Bricklayers. Banner did not challenge any of the Joint Arbitration Board's decisions, nor did it pay damages in accordance with the 1999 order.

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1. Not all monthly contribution reports contained this language. For a time, Banner submitted its own computer spreadsheets rather than the union-provided forms.

Appendix A

In October 1999, the Funds filed this action seeking a compliance audit of Banner's payroll from January 1, 1995, to the present, alleging that Banner had failed to submit accurate monthly contribution reports and had failed to make required monthly contributions. Banner filed a counterclaim for a refund of the monthly contribution payments it previously had paid the Funds on the ground of mistake of fact or law.

B. District Court Proceedings

The district court held a bench trial. The Funds entered into evidence agreed stipulations of fact and offered exhibits submitted as part of the final pre-trial order; Banner additionally presented the testimony of Ciancanelli and Ciancanelli's son. The Ciancanellis testified that Banner complied with CBA obligations because of union coercion.

In its written findings of fact after the trial, the district court rejected, on credibility grounds, the Ciancanellis' version as to why Banner complied with CBA obligations:

> After review, this Court finds that Ciancanelli, as president of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as president of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor

> at trial when testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority, even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.

R.40 at 5-6 (footnotes omitted). The court thus rejected Banner's position that it paid monthly contributions only as a result of union coercion.

The court then determined that Banner had adopted the CBA through its course of conduct:

> namely, its continuous submission of contribution reports to Plaintiffs, its adherence to the wage and fringe benefit contribution rates prescribed by the Collective Bargaining Agreement when making such payments and contributions, its practice of remitting union dues on behalf of its employees to Local 21, and its complete cooperation in the 1995 payroll audit, which revealed no delinquencies.

R.40 at 8. Moreover, the court concluded that the contributions were made according to the terms of the written CBA, thus satisfying the requirement of section 302(c)(5)(B)

of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. § 186(c)(5)(B), that payments to employee representatives be made only "as specified in a written agreement with the employer." As a result, the court concluded that the Funds were entitled to conduct an audit and that Banner was not entitled to recoup any of the amounts paid to the Funds due to mistake of fact or law. Banner timely appealed.[2]

II

ANALYSIS

A. Standard of Review

Banner brings a variety of legal and factual challenges to the district court's decision. On appeal following a bench trial, we review the district court's conclusions of law de novo and its findings of fact for clear error. *See Petrilli v. Drechsel*, 94 F.3d 325, 329 (7th Cir. 1996). "[O]ne who contends that a finding is clearly erroneous has an exceptionally heavy burden to carry on appeal." *Spurgin-Dienst v. United States*, 359 F.3d 451, 453 (7th Cir. 2004). Additionally, a credibility determination "'can virtually never be clear error.' " *Id.* (quoting *United States v. Archambault*, 62 F.3d 995, 999 (7th Cir. 1995)).

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2. After Banner filed its notice of appeal, we ordered the parties to file jurisdictional memoranda on the issue of whether the district court had issued a final appealable judgment. Only Banner responded to our order. Having reviewed Banner's submission and the supplements to the record, we conclude that the district court did in fact issue a final order disposing of all claims and that Banner's appeal is not premature.

Appendix A

B. Conduct Manifesting Intent To Be Bound

We begin with the well-established principle " 'that a collective bargaining agreement is not dependent on the reduction to writing of the parties' intention to be bound,' . . . rather '[a]ll that is required is conduct manifesting an intention to abide and be bound by the terms of an agreement.' " *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 373 (7th Cir. 1985) (quoting *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982));*see also Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 500 n.2 (7th Cir. 1996); *Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001); *Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988).

Prior cases that have held an employer bound to a collective bargaining agreement as a result of conduct have emphasized, among other factors, the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent and the submission of the employer to union jurisdiction, such as that created by grievance procedures. *See Robbins*, 836 F.2d at 332 (determining that an employer who promised to abide by but refused to sign a collective bargaining agreement adopted the agreement when it paid the union scale, turned over dues under a checkoff system, negotiated grievances and made some pension and welfare contributions); *Gariup*, 777 F.2d at 376 (indicating that an employer became a party to the collective bargaining agreement when it signed an Assent of Participation form,

returned unsigned Acceptance of Working Agreement forms, made contributions to the pension funds and paid wages at union rates); *Brown v. C. Volante Corp.*, 194 F.3d 351, 354-56 (2d Cir. 1999) (holding that conduct of an employer who did not sign two subsequent collective bargaining agreements but paid contributions and wages at the rates prescribed by those agreements manifested an intent to adopt the unsigned agreements); *see also Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 (indicating that an employer's payment of contributions at the rate provided in a successor contract manifested acceptance). *But see Moglia v. Geoghegan*, 403 F.2d 110, 118 (2d Cir. 1968) (noting the presence of similar factors yet declining to find that employer adopted a collective bargaining agreement). Thus, in analyzing Banner's conduct for evidence of agreement to the CBA, the district court properly looked to these and similar factors.

To the extent that Banner challenges the district court's conclusion that, by its conduct, Banner manifested assent to the CBA, we decline to disturb the district court's judgment. We recognize, as did the district court, that Ciancanelli never signed the CBA on behalf of Banner. Our precedent makes clear, however, that a signature to a collective bargaining agreement is not a prerequisite to finding an employer bound to that agreement. *See Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d at 777 ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *see also Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 ("Acceptance . . . can be manifested by conduct as well as by words.").

Other factors (to which Banner itself stipulated) demonstrate conduct manifesting assent to the terms of the CBA. For nearly seven years, Banner submitted monthly contribution reports to the Funds. In accordance with those reports, Banner paid fringe benefit contributions to the Funds. The contributions were made according to the rates prescribed by the CBA and were detailed in memoranda sent to signatories of the CBA (and to Banner). Some of the monthly contribution reports contained certification language indicating that the contributions were made pursuant to the obligations of the CBA.[3] Additionally, Banner remitted union

3. The Funds suggest that "[o]n at least one occasion, Ciancanelli personally signed the monthly contribution report." Appellee's Br. at 18. However, they make this contention without record cite in violation of Rule 28(a)(9)(A) of the Federal Rules of Appellate Procedure, and, upon an independent review of the record, we did not discover any signed contribution reports.

The apparent absence of a signature to the certification language, despite the space provided for one, limits, to some degree, the significance of the certification language in this case. We also note, however, that checks signed by Ciancanelli were remitted with the reports. Together, we consider the certification language on the monthly reports and the accompanying payments as entitled to some weight in an analysis of whether Banner's conduct manifested intent to abide by the collective bargaining agreement. *Compare Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) (indicating that signed certification language on monthly remittance reports "was entitled to *some* weight . . . and maybe a lot" in considering whether employer was bound to a collective bargaining agreement) *with Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir. 2003) (concluding that, under the circumstances, signed certification language was evidence, but only "weak evidence," that employer considered collective bargaining agreement to be in effect).

dues on behalf of employees and paid wages at the rates prescribed by the CBA. It cooperated in an audit by the Funds in 1995. Moreover, about four times per year, Banner requested bricklayers from Local 21 or its Apprenticeship and Training Program.[4] It donated a truck to Local 21's training program. Finally, Banner took no action to challenge jurisdiction after the Joint Arbitration Board found it guilty of labor violation charges under the CBA brought by another Local in 1997, 1998 and 1999.

Before the district court, Banner attempted to minimize this objective evidence of intent to be bound, characterizing the seven-year course of conduct as the product of coercion. The district court rejected this explanation, largely on credibility grounds. It disbelieved the Ciancanellis' testimony that Banner paid union wages, remitted union dues, made fringe benefit contributions and repeatedly submitted to jurisdictional authority created by the CBA solely because union representatives threatened picketing. We see no reason to reject the court's credibility determination, especially given

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4. Banner characterizes this factual finding of the district court as clearly erroneous. However, the finding corresponds directly with Agreed Stipulation No. 21:

> At least four to five times per year, Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

R.50 at 6.

the degree of deference required by the standard of review.[5] *See Spurgin-Dienst*, 359 F.3d at 453.

Nonetheless, even accepting the Ciancanellis' testimony, the Ciancanellis testified that the representatives of the union threatened picketing or "shut down" of jobs. We have

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5. Banner invites us to reject the district court's credibility determination on the ground that it is contrary to the parties' agreed stipulations. In particular, Banner asserts that the parties stipulated that "Ciancanelli . . . submitted the monthly contribution reports in response to threats . . . to shut his jobs down if he did not do so." Appellant's Br. at 17 n.10.

Banner's purposeful omission is misleading. Stipulation No. 29 actually reads:

> Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.

R.50 at 8 (emphasis added). Thus, Banner's complaint regarding the court's credibility determination rings hollow. That determination was consistent with the agreed stipulations and well within the district court's discretion.

We note further that Ciancanelli's assertion is not supported by objective evidence in the record. For instance, during the seven-year relationship, Banner never complained to an appropriate authority about the alleged acts of the union representatives, nor did it indicate, for instance, on its monthly contribution checks, that it paid the amounts only under protest. For this additional reason, we accept the district court's credibility determination.

indicated, however, that threats to strike do not nullify conduct manifesting assent to a collective bargaining agreement. In *Robbins*, an employer attempted to explain away its compliance with the terms of a collective bargaining agreement, partially on the ground that the union had threatened to strike. *See Robbins*, 836 F.2d at 332. We rejected this excuse:

> Lynch was bound, under the approach of *Gariup*. The threat to strike is unexceptional. Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of "no agreement, no work" hardly makes adherence to the agreement involuntary, as Lynch supposes. This is the threat, express or implied, of every contractual negotiation. (E.g., "Unless you pay my price, I won't sell you my iron ore.")

Id. at 333. As to the threats of picketing, we note that, during the seven years of allegedly coercive acts by the union, Banner never once complained to the National Labor Relations Board ("NLRB") or any other authority about the union's activities.

In sum, the district court was entitled to conclude that Banner's seven-year course of conduct manifested an intent to be bound to the terms of the CBA. Although Ciancanelli never signed the CBA, the company's regular monthly contributions, payment of union wages, remission of union dues, failure to challenge jurisdictional authority created by the CBA and other activities consistent with the conduct of a signatory constitute acceptance by performance.

C. "Written Agreement" Requirement

Having concluded that Banner's conduct manifested an intent to abide by the terms of the CBA, we next must consider whether Banner's monthly fringe benefit contributions comply with section 302(c)(5) of the LMRA. Section 302 of the LMRA generally forbids employer payments to representatives of employees. *See* 29 U.S.C. § 186(a). However, section 302(c)(5)(B) contains an exception for payments made in conformity with the terms "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B).[6] Banner argues that the payments it made to the Funds were not made under a "written agreement." On this basis, Banner seeks to avoid any present obligations to the Funds and, in its counterclaim, seeks a refund of the amounts previously paid in monthly contributions to the pension fund.

Section 302 of the LMRA ensures that payments to employee representatives are made for proper purposes. The

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6. 29 U.S.C. § 186(c) provides in relevant part:

> The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . .

Supreme Court has described the policy concerns that animate section 302:

> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.
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> . . . .
>
> Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain.

Arroyo v. United States, 359 U.S. 419, 425-26 (1959); *see also Mazzei v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 961 (7th Cir. 2001) (quoting *Arroyo*, 359 U.S. at 425-26); *Gariup*, 777 F.2d at 375 (same). In *Gariup*, we ourselves explained:

> Congress required that a written agreement exist between the employer and the employees' representative governing the rights of employees on whose behalf the contributions were made to ensure "that employee benefit trust funds 'are

> legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them.' "

Gariup, 777 F.2d at 375 (quoting *U.M.W.A. Health & Ret. Funds v. Robinson*, 455 U.S. 562, 570 (1982)). Mindful of these legislative purposes underlying the provision, we consider whether Banner's contribution obligations were "specified in a written agreement with the employer," as required by section 302(c)(5)(B). 29 U.S.C. § 186(c)(5)(B).

We begin with the proposition that "a signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B)." *Gariup*, 777 F.2d at 375; *see Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *see also Central States, Southeast & Southwest Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 460 (6th Cir. 1989) (indicating that an interim agreement and a participation agreement that incorporated a written trust agreement sufficiently comported with section 302(c)(5)(B)). Indeed, in some situations, even an "expired agreement—one that has no *contractual* force—nevertheless can satisfy the statutory requirements." *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir. 2003); *see also Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996) (indicating that a repudiated pre-hire agreement "provides a sufficient safeguard against the illegal payments § 302(c)(5)(B) is intended to prevent"); *Denver Metro. Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1373

(10th Cir. 1978) (indicating that an expired collective bargaining agreement and trust agreements incorporated therein satisfy section 302(c)(5)(B) (quoting *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970))); *cf. NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864-65 (5th Cir. 1997) (indicating that valid "make whole" remedy ordered by NLRB against successor employer who had not signed a collective bargaining agreement did not offend the policies behind section 302(c)). Thus, obligations have been enforced in a variety of circumstances, absent a signature to a current collective bargaining agreement.

Moreover, section 302(c)(5)(B) does not require a *signed* agreement;[7] it merely requires a "written" one. 29 U.S.C. § 186(c)(5)(B); *see Brown*, 194 F.3d at 355 ("Section

7. We recognize that the existence of a signature to *some* document has been relevant in cases addressing whether an employer is bound to make fringe benefit contributions. *See, e.g., Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 376 (7th Cir. 1982) (citing employer's signature to Assent of Participation form which referenced the unsigned CBA); *Brown v. C. Volante Corp.*, 194 F.3d 351, 353 (2d Cir. 1999) (noting submission of signed contribution reports). Signatures in these cases are certainly relevant to establish the employers' assent to the terms of the agreements upon which they are found. *Cf. Laborers' Pension Fund v. Blackmore Sewer Const., Inc.*, 298 F.3d 600, 606 (7th Cir. 2002) (indicating in the context of a collective bargaining agreement negotiated by a multi-employer association that "[s]igning the final agreement that has been negotiated certainly qualifies as conclusive evidence that the employer intended to be bound"). To the extent signatures are relevant for this purpose, we note Ciancanelli's signature to the monthly contribution checks remitted for nearly seven years. Nonetheless, we emphasize that section 302(c)(5)(B) of the LMRA itself imposes no signature requirement.

302(c)(5)(B) does not require that an agreement be signed, only that it be 'written' and set forth 'a detailed basis on which . . . payments are to be made' to a trust fund."); *Nat'l Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372, 375 (6th Cir. 1997) ("The statute does not specify any signature requirement and the term 'written agreement' is unambiguous in relation to such.").[8] As our

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8. Both the Second and the Sixth Circuits have distinguished their prior case law on this issue. In *National Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372 (6th Cir. 1997), the Sixth Circuit distinguished its prior decision in *Merrimen v. Paul F. Rost Electric, Inc.*, 861 F.2d 135 (6th Cir. 1988). In *Merrimen*, the court had found significant the absence of a signature to the CBA in the context of the section 302(c)(5)(B) analysis. *See id.* at 139. In that case, however, the CBA itself required a signature to a Letter of Assent in order to demonstrate acceptance of the CBA. *See id.* at 136; *see also Nat'l Leadburners Health & Welfare Fund v. O.G. Kelley*, 129 F.3d at 375 (emphasizing this fact). In *National Leadburners Health & Welfare Fund*, the Sixth Circuit distinguished *Merrimen* on that ground and clarified that *Merrimen* "does not impose a statutory signature requirement." *Id.* at 375. The court thus concluded that an employer could be bound by a collective bargaining agreement negotiated by a multi-employer association, despite the absence of that employer's signature to the agreement. *See id.* at 375-76.

Similarly, in *Brown*, 194 F.3d at 351, the Second Circuit distinguished its prior decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968). In *Moglia*, the court had relied partially on the fact that the collective bargaining agreement was unsigned. *See Moglia*, 403 F.2d at 114-15. In *Brown*, however, the court suggested that *Moglia* rested on the absence of conduct manifesting assent to the terms of the agreement. *See Brown*, 194 F.3d at 355 n.1. The court declared: "We did not . . . graft a signature requirement onto Section 302(c)(5)(B)." *Id.*

colleagues in the Sixth Circuit concluded: "[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature." *Nat'l Leadburners Health & Welfare Fund*, 129 F.3d at 376.

In the present case, the parties do not dispute that the contributions made by Banner to the Funds were made in accordance with the terms of the written CBA negotiated by the Bricklayers, including Local No. 21. The record indicates that Banner paid the monthly contributions as directed by the memoranda it received; those memoranda detailed the wage and benefit rates required by the CBA. Additionally, the contribution reports submitted by Banner for a time, with its monthly contributions, also referenced the "terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement" and "the terms of the applicable Trust Agreements." R.40 at 2-3.[9] Moreover,

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9. The Funds invite us on appeal to rely upon the existence of the certification language on some of the monthly contribution reports as a writing sufficient to satisfy section 302(c)(5)(B). *See* Appellee's Br. at 17 ("[T]he language contained within the monthly contribution reports can and should suffice as a written agreement.").

We note for the sake of clarity, however, that section 302(c)(5)(B) requires that the "written agreement" specify the "detailed basis on which such payments are to be made." 29 U.S.C. § 186(c)(5)(B). Certification language, by itself, does not provide the specificity necessary to satisfy section 302(c)(5)(B). However, such certification language is significant, and may be sufficient, to the extent that it *incorporates* other written agreements with the employer—such as a collective bargaining agreement or trust agreements—which do set

(Cont'd)

Banner does not contend that the contributions have been credited to Funds for any improper purpose.

In this case, the existence of a "written agreement," albeit an unsigned one, detailing the terms upon which the fringe benefit contributions were to be made, and Banner's payment of contributions in accordance with that agreement, effectively concludes our inquiry. *See Brown*, 194 F.3d at 355 ("[A]n unsigned, written agreement satisfies Section 302(c)(5)(B)'s 'written agreement' requirement."). Under these particular circumstances, section 302(c)(5)(B) and the policy concerns behind that provision are met because the contributions were made as "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). Banner cannot invoke section 302 of the LMRA as a loophole through which to escape obligations to the Funds. *See Gariup*, 777 F.2d at 376 (concluding that the employer's "attempt to use the written agreement requirement of section 302(c)(5)(B) to circumvent its responsibilities under the collective bargaining agreement must fail").

(Cont'd)

forth the "detailed basis" for payments as required by section 302(c)(5)(B). *See Guthart v. White*, 263 F.3d 1099, 1103 (9th Cir. 2001) ("Under the plain words of the statute, any written agreement with the employer can establish an employee's eligibility for Trust benefits, so long as it actually specifies, *directly or by incorporation*, 'the detailed basis' on which contributions are to be made." (emphasis added)); *see also Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) (suggesting significance of certification language); *Operating Eng'rs. Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) (similar).

Having reached this conclusion, we find no error in the district court's disposition of Banner's counterclaim. Banner's contributions were not made in violation of section 302(c)(5)(B) of the LMRA. Thus, Banner is not entitled to a return of its payments on that ground.

Conclusion

We conclude that the district court properly ordered Banner to submit to an audit of its fringe benefit contributions and properly dismissed Banner's counterclaim. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED SEPTEMBER 3, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 99 C 6633

Magistrate Judge
Martin C. Ashman

MASONRY INSTITUTE, BRICKLAYERS LOCAL 21 PENSION FUND, and **BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM,**

Plaintiffs/Counter-Defendants,

v.

BANNER RESTORATIONS, INC.,
an Illinois Corporation,

Defendant/Counter-Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs filed suit against Defendant for failing to submit contribution reports and payments pursuant to the terms of a Collective Bargaining Agreement. Defendant denied that it was bound by the terms of the Collective Bargaining Agreement because it never assented to the terms

of the agreement. In the alternative, Defendant argued that the conduct relied on by Plaintiffs to demonstrate Defendant's adoption of the Collective Bargaining Agreement resulted from coercion, and therefore could not be used to prove Defendants adoption of the agreement. Additionally, Defendant filed a counterclaim against Plaintiffs seeking the return of all monies paid to Plaintiffs from June 1991 through March 1998 due to mistake of fact or law.

On July 22, 2002, this Court held a bench trial. Pursuant to Federal Rule of Civil Procedure 52(a), this Court enters the following findings of fact and conclusions of law after reviewing the parties' submissions and all admissible evidence, and after assessing the credibility of the witnesses.[1]

I. Findings of Fact

1. Plaintiffs were established pursuant to the terms of a Collective Bargaining Agreement entered into between Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen and various parties. The Collective Bargaining Agreement, which incorporates certain trust agreements by reference, sets forth a detailed basis on which contributions to Plaintiffs most be made.

2. Defendant is an Illinois corporation with an office at 2950 West Taylor Street, Chicago, Illinois. Defendant performs concrete and masonry restoration work.

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1. The parties have consented to have this Court conduct any and all proceedings, including the entry of final judgment. *See* 28 U.S.C. § 636(c); Local R. 73.1(b).

Appendix B

3. Since 1991, Charles Ciancanelli has been the president of Defendant. Ciancanelli joined Bricklayers Local 21, in 1975, and he has paid dues to Local 21 from 1975 through at least July 2000.

4. From June 1991 through March 1998, Defendant submitted monthly fringe benefit contribution reports to Plaintiffs, noting the names and social security numbers of the employees who performed regular and overtime work covered by the Collective Bargaining Agreement. The monthly contribution reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #I were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

5. Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen sent Defendant and all signatories to the Collective Bargaining Agreement memoranda detailing the applicable wage and benefit rates for the year. For each year, Defendant's contributions corresponded to the rates prescribed in the Collective Bargaining Agreement. Ciancanelli signed the checks drawn on Defendant's various accounts to make the contributions.

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6. Defendant also remitted union dues on behalf of its employees to Local 21.

7. At least four times per year, Ciancanelli called either Local 21 or Local 21's Apprenticeship and Training Program to ascertain if any apprentice bricklayers were available for work. According to Ciancanelli, Local 21 and Local 21's Apprenticeship and Training Program were cooperative in providing apprentice bricklayers if any were available,

8. On several occasions, representatives of Local 21 visited Defendant's job sites and told Ciancanelli that Defendant had to hire members of Local 21, had to pay its employees union wages, and had to contribute on behalf of its employees to Plaintiffs. Representatives of Local 21 warned Ciancanelli that if Defendant failed to do this, Defendant's jobs would be shut down or Local 21 would picket Defendant's job sites.

9. On one occasion, a representative of Local 21 met with Ciancanelli and asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at the same job site as Defendant.

10. Around February 1995, Defendant cooperated in a payroll audit by Plaintiffs pursuant to the terms of the Collective Bargaining Agreement: The audit covered the period of April 1, 1992, through December 31, 1994. Plaintiffs found no delinquencies.

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11. On April 25, 1997, Defendant was notified by letter that the Joint Arbitration Board of the Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen would hold a hearing on May 15, 1997, to allow Defendant to respond to charges filed against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois.

12. Ciancanelli, as president of Defendant, donated a truck and driver to Local 21's Apprenticeship and Training Program. On September 8, 1997, Chris Laughlin, the apprentice coordinator of Local 21, wrote a letter to Ciancanelli thanking him for Defendant's donation.

13. In May 1998, Local 21 notified Defendant that it had failed to remit union dues for Gary Lelis, an employee. Defendant responded by remitting union dues for Lelis.

14. On May 6, 1998, Defendant was notified by letter that the Joint Arbitration Board would hold a hearing on May 21, 1998, to allow Defendant to respond to charges filed against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found, once again, that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois.

15. On April 13, 1999, Defendant was notified by letter that the Joint Arbitration Board would hold a hearing on April 29, 1999, to allow Defendant to respond to charges filed

against it by Bricklayers Local 14. In an undated decision, the Joint Arbitration Board found, for a third time, that Defendant violated certain provisions of the Collective Bargaining Agreement at a job site in Romeoville, Illinois. This time the Joint Arbitration Board ordered Defendant to pay damages to Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen, Bricklayers local 14, and other parties.

16. Defendant took no action in response to any of the decisions of the Joint Arbitration Board. That is, Defendant did not challenge the adverse decisions of the Joint Arbitration Board, including the decision ordering Defendant to pay damages. Defendant has still not paid damages to anyone in accordance with the Joint Arbitration Board's order.

17. Representatives of Local 21 repeatedly asked Ciancanelli, as president of Defendant, to sign the Collective Bargaining Agreement, but Ciancanelli always refused to sign the agreement. At no time did Ciancanelli, as president of Defendant, sign the Collective Bargaining Agreement.

18. After review, this Court finds that Ciancanelli, as president of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as president of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his

demeanor and his son's[2] demeanor at trial when testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority; even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.[3]

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2. Ciancanelli's son took the stand at trial to, among other things, corroborate Ciancanelli's testimony on Local 21's alleged "acts of coercion," particularly the link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998.

3. Even assuming some type of link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998 (thereby finding Ciancanelli's and his son's testimony credible to some extent), this Court does not believe that such conduct by Local 21 offers Defendant any solace. Defendant has not explained how Local 21's threats resulted in Defendant's involuntary adherence to The terms of the Collective Bargaining Agreement for approximately seven years and why Defendant had no alternative but to continue adhering to the terms of the Collective Bargaining Agreement for approximately seven years under the circumstances. *See, e.g., Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d. Cir. 1989); *Hart v. Canadian Imperial Bank of Commerce*, 43 F. Supp. 2d 395, 399-400 (S.D.N.Y. 1999) (*quoting Kamerman*, 891 F.2d at 431); *Henderson County Drainage Dist. No. 3 v. United States*, No. 97-821 L, 2002 WL 1772972, at *8 (Fed. Cl. July 30, 2002). On this point, Judge Easterbrook's comments in *Robbins v. Lynch*,

(Cont'd)

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II. Conclusions of Law

1. This Court has jurisdiction over this case pursuant to 29 U.S.C. § 1132(e)(1). Accordingly, Defendant's Emergency Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

2. Section 186 of Title 29 of the United States Code prohibits payments by employers to labor organizations, employee representatives, or similar parties but not if the payments are made to a trust fund established by the labor organization, employee representative, or similar party for the sole and exclusive benefit of the employees of the employer, provided that, among other things, the payments are held in trust for the purpose of paying for the benefit of employees, and the detailed basis on which the payments are to be made is specified in a written agreement with the employer.

(Cont'd)

836 F.2d 330, 333 (7th Cir. 1988), are noteworthy: "Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of 'no agreement, no work' hardly makes adherence to the agreement involuntary. . . ."

To the extent Defendant relies on Local 21's threats of work stoppages and pickets to make out a violation of 29 U.S.C. § 158(b), Defendant should have filed a claim before the National Labor Relations Board. *See Marquez v. Screen Actors s Guild Inc.*, 525 U.S. 33, 49-50 (1998); *Brown v. C. Volante Corp.*, 194 F.3d 351, 353-54 (2d Cir. 1999); *see also NLRB v. Dist. 65, Retail, Wholesale & Dep't Store Union*, 375 F.2d 745, 746-47 (2d Cir. 1967); *United Slate, Tile & Composition Roofer, Damp & Waterproof Worker Ass'n, Local No. 36*,172 N.L.R.B. 2248, 2249-51 (1968). The National Labor Relations Board has jurisdiction over such claims.

3. The written agreement required under § 186 need not be signed by the employer. *Brown*, 194 F.3d at 355 ("Section 302(c)(5)(B) does not require that an agreement be signed, only that it be 'written' . . . ."); *Moriarty v Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("[A] signature at the bottom of the collective bargaining agreement itself is unnecessary."); *Nat'l Leadburners Health & Welfare Fund v O.G. Kelley & Co.*, 129 F.3d 372, 376 (6th Cir. 1997) ("[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature."); *Robbins*, 836 F.2d at 332-33 (finding that the absence of a signed agreement was immaterial); *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 70, 375-76 (7th Cir. 1985) ("Moglia does not hold that a signed, unexpired collective bargaining agreement must exist to satisfy section 302.").

4. But if the written agreement is unsigned, then it is necessary for the party seeking to enforce the terms of the agreement to show that the employer adopted the agreement by its course of conduct. *Operating Eng'rs local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 650 (7th Cir. 2001) ("Acceptance . . . can be manifested by conduct as well as by words."); *Robbins*, 836 F.2d at 332 ("Employers may adopt a collective bargaining agreement by a course of conduct."); *Laborers' Pension Fund v. E. Guerra Co.*, No. 99 C 4085, 2000 WL 1349148, at *4 (N.D. Ill. Sept. 14, 2000) ("It is well established that an employer can bind itself to a collective bargaining agreement by course of conduct.").

5. The Collective Bargaining Agreement in this case, which incorporates certain trust agreements by reference, satisfies the written agreement requirement of § 186.

6. Although Defendant never signed the Collective Bargaining Agreement, this Court finds that Defendant adopted the terms of the Collective Bargaining Agreement by its course of conduct, namely, its continuous submission of contribution reports to Plaintiffs, its adherence to the wage and fringe benefit contribution rates prescribed by the Collective Bargaining Agreement when making such payments and contributions, its practice of remitting union dues on behalf of its employees to Local 21, and its complete cooperation in the 1995 payroll audit, which revealed no delinquencies.[4] *See Brown*, 194 F.3d at 354-55 (employer submitted sixty-one remittance reports "'in accordance with the terms of' the [collective bargaining agreements]," paid union wages, acknowledged responsibility to the funds, and cooperated in an audit); *Robbins*, 836 F.2d at 332 (employer paid the union scale, turned over dues under a checkoff system, negotiated grievances, and paid some pension and welfare contributions); *Gariup*, 777 F.2d at 376 (employer signed a document agreeing to contribute to the fund, submitted contribution reports, and paid wages at the rate prescribed in the collective bargaining agreement); *Laborers' Pension Fund*, 2000 WL 1349148, at *4 (employer submitted contribution reports indicating that it agreed to be bound by the collective bargaining agreement and made payments to the funds). Ciancanelli's occasional requests for employees from Local 21, Local 21's request of Ciancanelli to assume

4. The March 1992 contribution report, which allegedly contains Ciancanelli's signature, played no part in this decision.

responsibility for the correct and timely payment of wages and fringe benefit contributions of the other employer working at General Jones Armory, Ciancanelli's donation of the truck and driver to Local 21's Apprenticeship and Training Program, and Ciancanelli's response, or rather lack thereof, to three adverse Joint Arbitration Board decisions and one Joint Arbitration Board payment order bolster this conclusion.

7. The fact that Ciancanelli, as president of Defendant, verbally refused to sign the Collective Bargaining Agreement on more than one occasion does not rule out a finding that Defendant adopted the terms of the Collective Bargaining Agreement in light of Defendant's other conduct. *See United States Iran Co. v. NLRB*, 984 F.2d 864, 868-70 (7th Cir. 1993) (answering the question, "How is it ... that an employer can be found to have 'assumed' a contract that it repeatedly told the union it wanted no part of?"); *Digiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629, 637-38 (1997); *Sheriff v. Medel Elec. Co.*, 412 A.2d 38, 42 (D.C. 1980); Restatement (Second) of Contracts § 22 cmt. b, illus. 1 (1981). "Actions speak louder than words." *United States Can Co.*, 984 F.2d at 874 (Will, J., concurring).

8. The fact that Ciancanelli, as president of Defendant, might not have signed any document expressly indicating his intent to bind Defendant to the terms of the Collective Bargaining Agreement does not rule out a finding that Defendant adopted the terms of the Collective Bargaining Agreement in light of Defendant's other conduct. *See Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 650 ("Acceptance ... can be manifested by conduct as well as by words."); *Nat'l Leadburners Health & Welfare*

Fund, 129 F.3d at 376 ("[T]he statute is satisfied by a written agreement to which an employer is bound, not a written agreement to which an employer is bound which also carries that employer's signature."). An employer can bind itself to a written agreement by conduct alone. *E.g.*, *Robbins*, 836 F.2d at 332.

9. In view of the fact that Defendant adopted the terms of the Collective Bargaining Agreement, this Court rejects Defendant's claim that it is entitled to recoup monies already paid to Plaintiffs due to mistake of fact or law.[5] *See Operating Eng'rs Local 139 Health Benefit Fund*, 258 F.3d at 651-52; *Robbins*, 836 F.2d at 334; *Cooney v. Wiliiam Robinson Dairy Inc.*, 744 F. Supp. 841, 842 (N.D. Ill. 1990); *cf. UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of Am.*, 998 F.2d 509, 512-13 (7th Cir. 1993) (allowing the union to state a claim for recovery of mistaken payments where an employee, without authorization, instructed the union to increase his contributions); *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) ("[I]t would be inequitable to allow the fund to keep money which came its way by honest mistake, for example if the employer miscalculated the amount it owed or if it erroneously believed that it was legally obligated to pay certain monies to the fund.").

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5. According to Defendant, "[th]e mistake of fact [wa]s that [Ciancanelli] did not know that he had to have a signed contract. The mistake of law was that [Ciancanelli] did not know that it was against the law to make . . . payments [to Plaintiffs in the absence of a written agreement]." (Def.'s Proposed Conclusions of Law ¶ 34.)

10. Pursuant to the terms of the Collective Bargaining Agreement, Plaintiffs are entitled to conduct a payroll audit of Defendant for the period of January 1, 1995, through the present, and to obtain payment of the amount found due and owing, if any.

11. This case is distinguishable from *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), in that here Defendant appeared willing to accept the terms of the Collective Bargaining Agreement by its course of conduct. *Cf id.* at 118 ("Elmhurst did not appear to be willing to accept these terms at any time."); *accord Brown*, 194 F.3d at 355 n.1 (In *Moglia*, "[w]e rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer 'did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time.' ... Unlike the employee in *Moglia*, appellant's conduct [in this case] manifested an intent to adopt the terms of the unsigned CBAs.").

III. Conclusion

For the reasons stated, and based on a preponderance of the evidence adduced at trial, this Court finds in favor of Plaintiffs. Plaintiffs are entitled to conduct a payroll audit of Defendant for the period of January 1, 1995, through the present, and to obtain payment of the amount found due and owing, if any, in accordance with the terms of the Collective Bargaining Agreement. Defendant's Emergency Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

s/ Martin C. Ashman
MARTIN C. ASHMAN
United States Magistrate Judge

Dated: September 3, 2002

APPENDIX C — RELEVANT STATUTE

29 U.S.C. § 186

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * *

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(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include

acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar

payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer,

* * * *

APPENDIX D — STIPULATIONS OF FACT FILED SEPTEMBER 17, 2003

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS F I L E D EASTERN DIVISION

MAGISTRATE JUDGE ASHMAN
No. 99 C 6633

MASONRY INSTITUTE, BRICKLAYERS LOCAL 21 PENSION FUND, and BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM,

Plaintiffs/Counter-Defendants,

v.

BANNER RESTORATION, INC., an Illinois Corporation,

Defendant/Counter-Plaintiff.

STIPULATIONS OF FACT[1]

Plaintiffs, Masonry Institute, Bricklayers Local 21 Pension Fund and Bricklayer Local 21 of Illinois Apprenticeship and Training Program, and defendant, Banner Restorations, Inc., by their respective attorneys, do hereby stipulate and agree as follows:

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1. Stipulation of Fact prepared by counsel for Masonry Institute Bricklayers Local 21 Pension Fund – Susan Brannigan and tendered in open court on July 22, 2002 just before opening of trial.

Appendix D

1. Plaintiffs, Masonry Institute, Bricklayers Local 21 Pension Fund and Bricklayer Local 21 of Illinois Apprenticeship and Training Program are maintained and administered in accordance with and pursuant to the provisions of §302(c)(5) of the National Labor Relations Act ("NLRA"), as amended, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001, *et seq.*, and other applicable federal law and are administered pursuant to the terms and provisions of a certain Restated Agreement and Declaration of Trust ("Trust Agreement").

2. Banner Restorations, Inc. ("Banner"), an Illinois corporation with an office located at 2950 West Taylor Street, Chicago, Illinois, was incorporated on October 11, 1991.

3. The president of Banner Restorations, Inc., is and at all times has been Charles Ciancanelli, Sr. ("Ciancanelli").

4. Ciancanelli was president of City Wide Builders, Inc. ("City Wide"), an Illinois corporation. City Wide Builders, Inc., was incorporated on February 9, 1987, and was dissolved involuntarily on July 1, 1997.

5. Banner filed State of Illinois Domestic Corporation Annual Reports for the years 1992 through 1999, each of which was signed by Ciancanelli as president and listed 2900 West Taylor Street, Chicago, IL, 60612, as Ciancanelli's residential address. City Wide filed State of Illinois Domestic Corporation Annual Reports for the years 1988 through 1996, each of which was signed by Ciancanelli as president, and/or Elizabeth Ciancanelli as secretary and identified 2900 West Taylor Street, Chicago, IL 60612, as the address of the corporate directors and officers.

6. Ciancanelli joined Bricklayers Local 21 in about 1975, and at least as of July 2000 was still a dues paying member of Bricklayers Local 21.

7. Ciancanelli worked as a bricklayer for Irwin Axelrod for about 10 years until about 1990.

8. On some unknown date after June 1, 1990, Irwin Axelrod, as president of Banner Restorations, located at 2900 W. Taylor Street, Chicago, IL 60612, signed a Memorandum of Understanding with the Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsmen ("District Council"). The District Council consists of Local Unions 14, 20, 21, 27, 56, and 74.

9. On May 6, 1991, Irwin Axelrod, as president of Banner Restorations, located at 2900 W. Taylor St., Chicago, IL, signed a Memorandum of Agreement with Pointers, Cleaners and Caulkers Local Union No. 52, of the International Union of Bricklayers and Allied Craftsmen.

10. Ciancanelli, as president of Banner, did not sign a Memorandum of Understanding or other collective bargaining agreement with the District Council or Bricklayers Local 21.

11. Banner was notified, by letter dated April 25, 1997, that a hearing would be held on May 15, 1997, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on May 15, 1997, the Joint Arbitration Board issued an undated decision, finding

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Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL.

12. Banner was notified, by letter dated May 6, 1998, that a hearing would be held on May 21, 1998, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on May 21, 1998, the Joint Arbitration Board issued an undated decision, finding Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL.

13. Banner was notified, by letter dated April 13, 1999, that a hearing would be held on April 29, 1999, before the Joint Arbitration Board of the District Council and signatory contractor upon charges filed against Banner by Bricklayers Local 14. Following the hearing held on April 29, 1999, the Joint Arbitration Board issued an undated decision, finding Banner violated certain provisions of the collective bargaining agreement with respect to a job site in Romeoville, IL. The decision ordered Banner to pay damages to Local 14, Local 14 welfare and other funds, and to the District Council.

14. The decisions in each of the matters identified in paragraphs 11 - 13 stated that "Banner Restorations has a current collective bargaining agreement, which was signed on June 25, 1991 by Irwin [or Erwin] Axelrod."

15. From June 1991 through March 1998, Banner submitted monthly fringe benefits funds contribution reports, noting the names and social security numbers of the employees who performed work covered by the CBA, the regular and overtime hours each worked. With the reports, Banner remitted contributions that were allocated to the health and welfare fund (a/k/a masonry Institute), the pension fund, and the apprenticeship and training program, as reflected on Plaintiffs' Exhibit 18 (A) and (B).

16. Ciancanelli signed the checks drawn on Banners various accounts for the fringe benefits contributions. The checks list Banner's address as 2950 W. Taylor Street, Chicago, IL 60612.

17. ~~Ciancanelli signed the monthly contributions report for March 1992.~~[2] (SB GS)

18. Banner remitted Union dues on behalf of its employees ~~who had authorized the deduction of dues from their paychecks~~. (SB GS)

19. The individuals identified on Plaintiffs' Exhibit 3 were employed by Banner for sometime during the period of June 1991 through March 1998. ~~Each employee was a member of Local 21, as were~~ Ciancanelli, his son, Charles Ciancanelli, Jr., his brother Anthony, and hisnephew Anthony Slavic. (SB GS)

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2. Items crossed out in paragraph numbers 17, 18 & 19 were crossed out at request of Gerard C. Smetana, Counsel for Banner Restorations, Inc. and initials of Ms. Brannigan and Mr. Smetana were placed in the margin at the crossed out lines - "GS and SB."

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20. Banner employed Peter A. Marinopoulos as a bricklayer. Marinopoulos's father, also named Pete, was a business representative with Local 21 and currently is the president of Local 21 and of the District Council.

21. At least four to five times per year,-Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

22. Chris Laughlin, director of the Local 21 Apprenticeship & Training Program, whom Ciancanelli has known for most of Laughlin's life, wrote Ciancanelli thanking him for Banner's donation of a truck and driver to the program.

23. On a number of occasions over the years at various job sites at which Banner was working, representatives of Local 21, including Vern Gator, Bob Ned, and Bob McCormick, told Ciancanelli he had to hire members of Local 21, had to pay the employees the contract wage rates, and had to contribute to the Funds on the employees' behalf. Ciancanelli was told that if he did not do so, the Union representatives would shut the job down or Local 21 would picket the job site. Ciancanelli states that they also said he had to sign an agreement, which he refused to do.[3] (SB GS)

3. Addition in paragraph 23 is an additional sentence written in by Ms. Brannigan at the request of Mr. Smetana – which states: that they also said that he had to sign an agreement, which he refused to do (such additions are underlined and initialed by counsel.

24. On one occasion, Pete Marinopoulos, then a Local 21 business representative, and Bill McIntyre, a representative of the Masonry Institute, met with Ciancanelli and asked him to assume responsibility for the correct and timely payment of wages and fringe benefits of employees working for another masonry contractor on the General Jones Armory, a public works project in Chicago, IL.

25. Ciancanelli states that Marinopoulos asked him to sign a collective bargaining agreement, which Ciancanelli refused.

26. The District Council sent Banner, as it did its signatory contractors, memoranda detailing the applicable wage and benefits rates for the contract year. Banner's contributions reflected the rates prescribed for each contract year by the unsigned CBAs.

27. Banner previously cooperated with a payroll audit by the Funds' conducted in about February 1995, pursuant to the terms of the CBAs and Trust Agreement. The audit covered the period of April 1, 1992 through December 31, 1994, and found no delinquencies.

28. The monthly contributions report form contains the following certification:

> I HEREBY CERTIFY that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in

> the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

29. Ciancanelli asserts that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.[4]

s/ Susan Brannigan
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4. Through inadvertence the Stipulation of Fact was retained by the court, but not officially made a part of the record until September 22, 2003 when it was officially docketed following a motion for leave to file same, by petitions without objection of respondent and so ordered by Magistrate Judge Ashman.